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No. 91-1561

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JAMES E. HUGHES, et al.,

Petitioners,

vs.

CONSOL PENNSYLVANIA COAL COMPANY, et al,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONERS' REPLY BRIEF

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INTRODUCTION

Respondents distort the facts of this case and conveniently twist and misrepresent the procedural posture of the matters before this Supreme Court.

First, this Court was ill advised by Respondents' contention that Petitioners' petition is a cross-petition. This petition docketed at 91-1561 is and is intended to be a petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit independent of

the Petition filed by Respondents at 91-1324[1]. See Sup. Ct. R. 12.2, 13.4.

Second, as is stated hereinafter, once the district court and the Third Circuit decided that the Monongahela had the power to condemn the petitioners' property, these courts were without jurisdiction to decide the issue of eminent domain delay damages for such damages are not properly before the court until the time of payment of the award or judgment.

Finally, the flexible approach referred to in the text of the RICO statute, the legislative history of congress, and the references in *H.J. Inc.*, is being disregarded by the circuit courts and the circuit courts are rigidly interpreting what period of time amounts to a pattern.[2]

The petition should be granted to protect the constitutional law on just compensation and restore the flexible interpretation of what constitutes a pattern under the RICO Statute.

A. *EMINENT DOMAIN DELAY COMPENSATION - AN UNWAIVABLE CONSTITUTIONAL AND LEGAL RIGHT*

Respondents' brief in opposition (Br.Opp.) to the petition is profoundly mistaken in asserting that the constitutional and legal right to eminent domain delay compensation can or has been waived. In *Seaboard* this Court held that just compensation includes interest for delay.[3] A condemnee is entitled to delay compensation as a matter of right.[4]

Under the statutory Pennsylvania law addressing eminent do-

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1 The Supreme Court consolidated these cases on March 31, 1992.

2 18 U.S.C. Sec. 1961, et seq.; *H.J. Inc. v. Northwestern Tel. Co.*, 492 U.S. 229 (1989).

3 *Seaboard Air Line Railway Company, et al. v. United States*, 261 U.S. 299, 43 S.Ct. 354, 67 L.Ed. 664 (1924).

Additionally, the Appellate Courts of the Commonwealth of Pennsylvania have held that the matter of the granting of eminent domain delay damages is a matter of right and law. See: *Com. v. 21.1 Acres of Land in Washington Twp.*, 61 Pa.Cmwlth. 383, 433 A.2d 915 (1983).

4 The issue of delay compensation in the context of this de facto taking was raised before the Third Circuit in petitioners' Petition for Rehearing.

main delay compensation as a matter of law the controlling Eminent Domain Code provides as follows:

Sec. 611. *Delay Compensation.*

> ..."Compensation for delay shall not be included by the viewers, *or the court or jury, on appeal as part of the award or verdict,* but *shall at the time of payment of the award or judgment be calculated as above* and added thereto." [Emphasis Added]. *Pennsylvania Eminent Domain Code*, Act of June 22, 1964, Special Sess., P.L. 84, as amended, 26 P.S. Sec. 1-611.

The law is clear, delay compensation is a matter of right and is a justiciable issue only at the time of payment of the award or judgment. No payment has been made on the award or judgment in this proceeding. Nothing concerning this matter has been waived. The lower courts erred in their analysis that delay damages were not appropriate because the trial court at the time did not have the jurisdiction to decide the eminent domain delay compensation issue.

Petitioners in both lower courts hotly contested the issue as to whether or not respondent Monongahela Railroad had the power to condemn on the facts of this case. The lower courts disagreed and held that Monongahela Railroad had the power to condemn these petitioners' property. The Pennsylvania Eminent Domain Code provision of Section 611 applies even though the de facto condemnation was affected by a public utility.[5]

Now that this has been held, the respondents must pay delay damages as a matter of constitutional right and law. The Pennsylvania Courts hold that delay damages must be paid whether or not condemnation takes place or whether or not the property is voluntarily conveyed, as long as it is acquired under the power to condemn. See *Township of Ridley*, cited below.

Both the District Court and the Third Circuit held that respondent railroad had the power to condemn. Moreover, respondents purchased the property required for the railroad right-of-way in the name of the

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[5] *Hassett v. Commonwealth of Pennsylvania, Department of Transportation*, 34 Pa.Cmwlth. 368, 384 A.2d 594 (1978).

railroad as grantee. The deed of one of the landowners contained the covenant that the conveyance was made "in lieu of condemnation".[6] Respondents agree that they were acquiring the petitioners' property under the guise, power and right of condemnation and that such power would be exercised unless a sale of the property was agreed to under the unilateral offer of respondents. Now respondents conveniently reverse their position and argue that these sales were voluntary. This contention makes no difference under the law. But this contention defies logic in the light of the overwhelming evidence of fraud and outrageous conduct engaged in by the respondents in acquiring the petitioners' property (petition at 8-13 and Br.in Opp. no.91-1324 at 3-7). These land sales were not arms-length transactions, they were sales procured by fraud and duress under the threat of eminent domain. The petitioners successfully proved in the courts below that they were not paid the just compensation they were entitled for their property. The compensation owed for delay now constitutionally follows when the award or judgment is paid.[7]

A de facto condemnor cannot be permitted to take property through fraud and duress based upon the threatened exercise of the power of eminent domain without paying the just compensation that a de jure condemnor taking property without fraud and duress, would have to pay. This unconstitutional and unlawful misapplication of the law by the courts below must be remedied by this Supreme Court by granting petitioners' petition and directing the defendants to pay this delay compensation as required by law.

B. *CONTINUITY AS IT RELATES TO THE RICO STATUTE MUST BE VIEWED BY A FLEXIBLE STANDARD. OTHERWISE, A RIGID TIME PERIOD USED TO DEFINE CONTINUITY WILL ESTABLISH PERIODS OF SAFE HARBORS SUCH AS A TWELVE MONTH PERIOD FOR FREE RACKETEERING ACTIVITY.*

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[6] TR1 Ex. 99, The Phillippi Deed, at page 3 states: "This deed is given by parties of the first part to parties of the second part in lieu of condemnation of the within property by party of the second part."

[7] *In Re Condemnation By City of Philadelphia, ETC.*, 40 Pa.Cmwlth. 409, 398 A.2d 224 (1979); *Township of Ridley v. Forde*, 73 Pa.Cmwlth. 611, 459 A.2d 449 (1983).

The flexible approach referred to in the text of the RICO Statute, the legislative history of Congress and the references in *H.J. Inc.* is being disregarded by the circuit courts. The circuit courts are ignoring the totality of the circumstances and rigidly interpreting what period of time amounts to a pattern.[8] This rigid time analysis is creating a huge loophole for violators of the RICO Statute, i.e., twelve months of RICO violations are for free.

The jury hearing and deciding the case below made the factual determination that the respondents were guilty of RICO violations (petition at 121a-136a). In overturning this jury verdict the lower courts ignored the record and evidence upon which the jury based its verdict.[9]

This massive scheme to defraud the petitioners and the more than 52 property owners of their land was *not* a scheme of activity planned and implemented in a short period of time. It was a well developed conspiracy to illegally obtain property which was planned over several years (petition at 4-9). The holding and reasoning of the Third Circuit allows coconspirators of a well planned and conceived pattern of racketeering to commence the previously planned illegal activity in month number one and end on month number twelve without any RICO violations and escape RICO because of their efficiency. This rigid time approach encourages efficient "arrangement(s) or order of things or activity" carefully planned and then implemented quickly or within one year.[10]

Moreover, and contrary to respondents' distortion of inconvenient facts, the record is replete with references to the construction of a second six mile right-of-way (TR1 Ex. 126 outlines the budget and specifics of the Manor right-of-way, the 14.6 mile finished rail line and the Nineveh right-of-way, the 6 mile unconstructed rail line; TR1 Ex. 137 a map of the area in question testified to and showing the unfinished 6 mile right of way; TR1 Ex. 40,29 the letters discussing the unfinished 6 mile right of way; and the jury was shown this unfinished section during a view).

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8 18 U.S.C. Sec. 1961, et seq.; *H.J. Inc. v. Northwestern Tel. Co.*, 492 U.S. 229 (1989).

9 Judge Tietlebaum who presided over the first trial found that continuity under *Barticheck* was proven. Judge Smith who was later assigned to the case for the second trial on damages reversed Judge Tietlebaum's ruling. See petition at 14.

10 See *H.J. Inc.*, 109 S.Ct. at 2900.

With so much evidence of this second right-of-way, the jury came to the correct conclusion in finding these respondents liable for RICO violations based upon evidence showing a future threat of a continuing pattern of racketeering.

With this case as the law, respondents and others have a blueprint to follow when they engage in criminal conduct (i.e., planning to acquire the needed parcels for the 6 mile right of way in a twelve month time period). Future RICO violators can begin their plan for future unfinished activity, and avoid RICO violations by later effectuating the previosuly planned scheme in one year. This defeats the purpose of the RICO statute and creates a hugh loophole for these respondents and others to engage in RICO activities without any penalty.

CONCLUSION

This Supreme Court should grant petitioners' petition to rectify, clarify and protect the law as set forth herein and in the petition docketed at 91-1561.

Respectfully submitted,

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